SIMATHARI SOMENAIDU v. PANGLIMA TENTERA LAUT DIRAJA MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABDUL AZIZ ABDUL RAHIM JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-01-495-11-2012]
30 JUNE 2015

ADMINISTRATIVE LAW: *Judicial review – Application for – Royal Malaysian Navy – Termination from service under Queen's Regulations – Whether Queen's Regulations could be relied upon for termination – Whether Queen's Regulations repealed by s. 217(1) of Armed Forces Act 1972 (AFA) – Whether Queen's Regulations saved by s. 217(2) of AFA – Whether Queen's Regulations remained in force*

STATUTORY INTERPRETATION: *Construction of statutes – Literal approach – Section 217(2) of AFA – Meaning of words 'made under' – Whether should be given plain and ordinary meaning*

The appellant, a non-commissioned serviceman with Tentera Laut Diraja Malaysia ('TLDM') was remanded for allegedly misusing flight warrants. In consequence, the respondents decided to terminate the appellant's services. Pursuant thereto, the third respondent requested the appellant to assist in preparing an application for the appellant to be terminated under The Queen's Regulations For The Royal Navy Revised 1967 (QRRN) Article 0877 Discharge – Service No Longer Required (SNLR) ('the Queen's Regulations') but the appellant refused. Therefore, the appellant was charged for insubordination under s. 49(b) of the Armed Forces Act 1972 ('AFA'). The appellant was found guilty and sentenced with suspension of leave and a warning. Based on the finding of insubordination, the first respondent instructed the third respondent to initiate a process for the appellant's termination from service under the Queen's Regulations. The third respondent acted accordingly and the appellant was therefore terminated from service with TLDM under the Queen's Regulations. Aggrieved, the appellant filed an application for judicial review ('application') at the High Court and sought, *inter alia*, for an order of *certiorari* to quash the decision to terminate him as a member of TLDM. It was the appellant's case that the Queen's Regulations had been applied to officers of The Royal Malaysian Navy by virtue of the Navy Ordinance 1958 ('the Ordinance') and with the repeal of the Ordinance by s. 217(1) of the AFA, the Queen's Regulations could not be relied upon to terminate the appellant's services. On the contrary, the respondents contended that although s. 217(1) of the AFA had repealed the Ordinance, the regulations including the Queen's Regulations continued to remain in force so long as they were not inconsistent with the

provisions of the APA. The trial judge found that the Queen's Regulations was still in force by virtue of s. 217(2) of the AFA and dismissed the appellant's application. Hence, the present appeal.

Held (allowing appeal with costs):
Per Alizatul Khair Osman JCA (for the majority):

(1) The Queen's Regulations were regulations which apply to the British Royal Navy and its application to the TLDM was made possible by virtue of s. 10(1) of the Ordinance. When the AFA came into force, the Ordinance together with other enactments and ordinances pertaining to the armed forces were declared repealed *vide* s. 217(1) of the AFA. Notwithstanding the repeal of the Ordinance under s. 217(1) of the AFA, s. 217(2) of the AFA also preserved the validity or enforceability of a subordinate or subsidiary legislation so long as they are not inconsistent with the provisions of the AFA, until they are specifically repealed. (paras 36, 39 & 40)

(2) Section 217(2) of the AFA, being a saving provision is very clear in its intention, which is to save all subordinate or subsidiary legislation made under the repealed enactments and ordinances set out in s. 217(1) of the AFA. The words 'made under' must be given its plain and ordinary meaning and cannot be extended to include regulations applied by s. 10(1) of the Ordinance. If this was the intention of the Legislature to save such regulations they could have done so by adding the words 'or applied under' after the words 'made under' in s. 217(2) of the AFA. As the Queen's Regulations is punitive in nature in that it provides, *inter alia,* for the termination of service of members of the TLDM, it is imperative that the words in s. 217(2) of the AFA be given a strict construction such that only regulations made under the ordinance are saved and not regulations applied by the ordinance. (paras 48-50)

(3) In the circumstances, the repeal of the ordinance would mean that the regulations applied by s. 10 of the Ordinance, which includes the Queen's Regulations, would by virtue of that repeal be also repealed. Therefore, the Armed Forces Council did not have power to approve the continued application of the Queen's Regulations. Its approval of the continued usage or application of the Queen's Regulations had no legal effect and was purely administrative in nature. (paras 58 & 63)

Per Abdul Aziz Abdul Rahim JCA (dissenting):

(1) In construing s. 217(2) of the AFA, one must apply the purposive approach and not to read the words literally. The purpose of the saving provision under s. 217 of the AFA is to save all regulations, orders, and other instruments applicable to the armed forces under the repealed enactments or ordinances in so far as they are not inconsistent with the provision of the AFA. In interpreting a statute, s. 17A of the

Interpretation Acts 1948 and 1967 provides that regard should be given to the purpose of the statute. Since the AFA was a consolidating statute, its purpose would be to consolidate all the principal laws or statutes pertaining to the armed forces under one principal Act. (paras 91 & 92)

(2) In order to avoid any *lacuna* in the law applicable to the armed forces following such consolidation, the Legislature in its wisdom had provided a saving provision whereby all subsidiary matters such as regulations, orders or instruments made under the repealed ordinances and enactments applicable to the armed forces previously were saved and continued to be applicable. On the facts, there was no specific regulation under the AFA to provide for the discipline and discharge of Malaysian Navy personnel. In the circumstances, the word 'made' used in s. 217(2) of the AFA should not be read literally. (paras 93 & 94)

(3) The Armed Forces Council has the authority to make or direct the application of the Queen's Regulations to TLDM. Even though the Queen's Regulations was not literally made under the repealed Navy Ordinance 1958, its application to the Malaysian Naval personnel is valid and lawful by virtue of the order of the Armed Forces Council made in its 366th meeting. (para 99)

Bahasa Malaysia *Headnotes*

Perayu, seorang anggota tentera tidak bertauliah Tentera Laut Diraja Malaysia ('TLDM') direman kerana didakwa menyalahgunakan waran penerbangan. Akibatnya, responden-responden membuat keputusan untuk menamatkan perkhidmatan perayu. Selaras dengan itu, responden ketiga meminta perayu membantu dalam menyediakan permohonan bagi perayu ditamatkan perkhidmatan di bawah The Queen's Regulations For the Royal Navy Revised 1967 (QRRN) Article 0877 Discharge – Service No Longer Required (SNLR) ('Queen's Regulations') tetapi ditolak perayu. Oleh itu, perayu dipertuduh kerana ingkar di bawah s. 49(b) Akta Angkatan Tentera 1972 ('AAT'). Perayu didapati bersalah dan dihukum dengan penggantungan cuti dan amaran. Berdasarkan dapatan keingkaran, responden pertama mengarahkan responden ketiga memulakan proses untuk menamatkan perkhidmatan perayu di bawah Queen's Regulations. Responden ketiga bertindak sewajarnya dan oleh itu, perayu ditamatkan perkhidmatan TLDM di bawah Queen's Regulations. Terkilan, perayu memfailkan permohonan semakan kehakiman ('permohonan') di Mahkamah Tinggi dan memohon, antara lain, untuk satu perintah *certiorari* membatalkan keputusan penamatannya sebagai anggota TLDM. Adalah kes perayu bahawa Queen's Regulations diguna pakai ke atas pegawai Tentera Laut Diraja Malaysia menurut Navy Ordinance 1958 ('Ordinan') dan dengan pemansuhan Ordinan oleh s. 217(1) AAT, Queen's Regulations tidak terpakai bagi menamatkan perkhidmatan perayu. Sebaliknya, responden-responden menghujahkan bahawa walaupun s. 217(1) AAT memansuhkan Ordinan, peraturan

A termasuk Queen's Regulations masih berkuat kuasa selagi ia selaras dengan peruntukan AAT. Hakim bicara memutuskan bahawa Queen's Regulations masih berkuat kuasa mengikut s. 217(2) AAT dan menolak permohonan perayu. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos):

B **Oleh Alizatul Khair Osman HMR (untuk majoriti):**

(1) Queen's Regulations adalah peraturan yang terpakai kepada Tentera Laut Diraja British dan penerapannya ke atas TLDM dilakukan mengikut s. 10(1) Ordinan. Apabila AAT dikuatkuasakan, Ordinan bersama-sama dengan enakmen dan ordinan lain berkenaan angkatan tentera diisytiharkan dimansuhkan melalui s. 217(1) AAT. Walaupun pemansuhan Ordinan di bawah s. 217(1) AAT, s. 217(2) AAT juga mengekalkan kesahihan atau penguatkuasaan undang-undang subordinat atau subsidiari selagi ia selaras dengan peruntukan AAT, sehingga ia dimansuhkan.

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(2) Seksyen 217(2) AAT merupakan suatu peruntukan berkecuali yang jelas dalam tujuannya, iaitu untuk menyelamatkan semua undang-undang subordinat atau subsidiari dibuat di bawah Enakmen-Enakmen dan Ordinan yang dibatalkan sepertimana dinyatakan dalam s. 217 (1) AAT. Perkataan 'made under' harus diberi makna yang nyata dan biasa dan tidak boleh dilanjutkan untuk merangkumi peraturan diguna pakai oleh s. 10(1) Ordinan. Jika ini ialah niat Badan Perundangan untuk menyelamatkan peraturan sedemikian mereka mungkin boleh berbuat demikian dengan menambahkan perkataan 'or applied under' selepas perkataan 'made under' dalam s. 217(2) AAT. Oleh kerana Queen's Regulations bersifat punitif kerana ia merangkumi, antara lain, penamatan perkhidmatan anggota TLDM, adalah penting bahawa perkataan dalam s. 217(2) AAT diberi pentafsiran ketat di mana hanya peraturan yang dibuat di bawah Ordinan tersebut diselamatkan dan bukan peraturan yang diguna pakai oleh Ordinan.

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(3) Dalam keadaan ini, pemansuhan Ordinan bermakna peraturan yang diguna pakai oleh s. 10 Ordinan, termasuk Queen's Regulations, turut terbatal berdasarkan kuasa pemansuhan. Oleh itu, Majlis Angkatan Tentera tidak mempunyai kuasa untuk meluluskan penggunaan berterusan Queen's Regulations. Kelulusan penggunaan atau aplikasi berterusan Queen's Regulations tidak mempunyai kesan undang-undang dan hanyalah bersifat pentadbiran.

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Oleh Abdul Aziz Abdul Rahim HMR (menentang):

(1) Dalam mentafsir s. 217(2) AAT, seseorang perlu menggunakan pendekatan purposif dan tidak membaca perkataan secara literal. Tujuan peruntukan penyelamat di bawah s. 217 AAT adalah untuk menyelamatkan semua peraturan, perintah, dan surat cara lain yang

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terpakai kepada angkatan tentera di bawah Enakmen atau Ordinan yang dimansuhkan setakat yang mana ia selaras dengan peruntukan AAT. Dalam mentafsir statut, s. 17A Akta Tafsiran 1948 dan 1967 memperuntukkan bahawa perhatian perlu diberikan kepada tujuan statut. Oleh kerana AAT adalah suatu statut bergabung, tujuannya adalah untuk menggabungkan kesemua undang-undang utama atau statut berkaitan dengan angkatan tentera di bawah Akta utama.

(2) Bagi mengelakkan apa-apa kelompangan dalam undang-undang terpakai kepada angkatan tentera berikutan penggabungan sedemikian, Badan Perundangan menyediakan peruntukan penyelamat di mana semua perkara subsidiari seperti peraturan, perintah atau surat cara yang dibuat di bawah Ordinan and Enakmen yang dimansuhkan yang berkaitan dengan angkatan tentera terdahulu diselamatkan dan terus digunakan. Mengikut fakta, tidak ada peraturan khusus di bawah AAT yang diperuntukkan bagi disiplin dan pelepasan anggota Tentera Laut Malaysia. Dalam keadaan ini, perkataan 'made' diguna pakai dalam s. 217 (2) AAT tidak boleh dibaca secara literal.

(3) Majlis Angkatan Tentera mempunyai kuasa untuk membuat atau mengarahkan pemakaian Queen's Regulations terhadap TLDM. Walaupun Queen's Regulations tidak dibuat di bawah Navy Ordinance 1958 yang dimansuhkan, pemakaiannya kepada anggota Tentera Laut Malaysia adalah sah dan mengikut undang-undang menurut perintah Majlis Angkatan Tentera yang dibuat dalam mesyuarat ke-366.

Case(s) referred to:
Md Redzuan Alang lwn. Panglima Tentera Laut & Satu Lagi [2011] 1 CLJ 656 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 56(1)
Armed Forces Act 1972, ss. 15, 36, 49(b), 155, 157, 216(1), (4), 217(1), (2)
Federal Constitution, art. 137(1), (2)
Interpretation Acts 1948 and 1967, ss. 17A, 28, 86(1)

Navy Ordinance 1958 [UK], ss. 10(1), 11, First Schedule para 3

Other source(s) referred to:
GC Thornton, *Legislative Drafting*, 4th edn, p 388
NS Bindra, *Interpretation of Statute,* 9th edn, pp 998, 1421

For the appellant - Yudistra Darma; M/s Raj, Ong & Yudistra
For the respondents - Effendi Nazila Abdullah; SFC

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-99-05-2012 (overruled).]

Reported by Sandra Gabriel

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JUDGMENT

Alizatul Khair Osman JCA (majority):

[1] This appeal before us stems from the decision of the learned High Court Judge in Kuala Lumpur who had dismissed the appellant's application for judicial review to, *inter alia*, quash the decision of the respondents in terminating his service with the Royal Malaysian Navy or Tentera Laut Diraja Malaysia (TLDM).

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Brief Background

[2] The appellant was a non-commissioned serviceman with the TLDM at the time of his termination.

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[3] On 20 August 2010, the appellant was remanded in IPD Petaling Jaya for allegedly misusing 'waran penerbangan udara' or flight warrants. He was later charged under s. 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 at the Kuala Lumpur High Court.

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[4] The respondents then decided to terminate his services on the ground his services were no longer required and that he had caused disrepute to TLDM.

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[5] Pursuant thereto, a letter was issued to the third respondent on 3 March 2011 to submit the application for the appellant to be terminated under "The Queen's Regulations For The Royal Navy Revised 1967 (QRRN) Article 0877 – Discharge Service No Longer Required (SNLR)."

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(see pg. 46 of the record of appeal)

[6] The appellant was asked by the third respondent to assist in preparing the application for his termination. The appellant however refused.

[7] The respondents then took action against the appellant and charged him for insubordination under s. 49(b) of the Armed Forces Act 1972 (AFA). He was found guilty and imposed a sentence of "tahanan cuti 28 hari" with effect from 21 February 2012 and a warning.

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[8] Based on the same finding of insubordination the first respondent instructed the third respondent (Komander Rafe bin Hashim) the initiate the process for the appellant to be terminated from service under "The Queen's Regulations For the Royal Navy Revised 1967 (QRRN) Article 0877 Discharge – Service No Longer Required (SNLR) "(the Queen's Regulations)".

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[9] The third respondent acted accordingly and on 21 February 2012 the first respondent approved the appellant's termination, under the aforesaid Queen's Regulations, the termination to take effect on 29 March 2012.

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[10] Aggrieved with the respondent's decision, the appellant filed an application for judicial review seeking, *inter alia*, the following reliefs:

(a) an order of *certiorari* to quash the decision to terminate him as a member of the Royal Malaysian Navy (TLDM);

(b) an order of *mandamus* to direct the respondents to reinstate him as a member of the Royal Malaysian Navy (TLDM); and

(c) a declaration that he was entitled to all his salary, allowances and benefits which he would have enjoyed had he not been terminated.

[11] The learned judge dismissed the appellant's application. Hence this appeal.

Issue

[12] Before us the appellant confined himself only to one issue, namely, whether the Queen's Regulations still have the force of law.

The Appellant's Contention

[13] The Queen's Regulations is no longer applicable pursuant to the repeal of the Navy Ordinance 1958 under s. 217(1) of the Armed Forces Act 1972 (AFA).

[14] The Queen's Regulations was only used or applied by virtue of the repealed Navy Ordinance 1958. They were never made under or enacted pursuant to the Navy Ordinance 1958. (the said Ordinance)

[15] The said Ordinance together with the Malay Regiment Enactment, the Federation Regiment Ordinance 1952, the Military Force Ordinance 1952, the Air Forces Ordinance 1958, the Territorial Army Ordinance 1958, the Naval Volunteer Reserve Ordinance 1958 and the Air Force Volunteer Reserve Ordinance 1958 were repealed under s. 217(1) of the AFA.

[16] The appellant contended that although s. 217(2) of the AFA provided that "rules, regulations … made under the enactment and ordinances hereby repealed shall remain in force until specifically repealed", this provision did not apply to the Queen's Regulations.

[17] The reason, according to learned counsel is that s. 217(2) only saves those rules and regulations made under the repealed enactment and ordinances, including the said Ordinance. The Queen's Regulations on the other hand was never made under the said Ordinance. It was merely applied by virtue of s.10 of the said Ordinance.

[18] Learned counsel submitted that the learned judge erred in holding that the Queen's Regulations still has the force of law in Malaysia.

[19] In holding such, the High Court, according to counsel, had departed from an earlier High Court decision in the case of *Md. Redzuan Alang lwn. Panglima Tentera Laut & Satu Lagi* [2011] 1 CLJ 656, pp. 611-612 where the

learned Judicial Commissioner held that the Queen's Regulations were deemed inapplicable as they were not made under the said Ordinance and hence did not fall within the proviso in s. 217(2) of the AFA.

[20] Arising from the above, there is now two conflicting decisions on the applicability of the Queen's Regulations in this country.

[21] Apart from the fact that the Queen's Regulations were not made under the said Ordinance, the said Regulations are no longer enforceable for the following reasons:

(a) the Queen's Regulations have not been published in the *Gazette* as required under s. 86(1) of the Interpretation Acts 1948 and 1967 (Act 388). Section 86(1) provides that subsidiary legislation made under any Act of Parliament, ordinance, enactment or other lawful authority, shall, unless it be otherwise expressly provided in any Act of Parliament, Ordinance, be published in the *Gazette* and, unless it be otherwise provided in such subsidiary legislation, shall take effect and come into operation as law on the date of such operation.

(b) the AFA is a consolidating statute as reflected in its long title which reads:

> An Act to amend and consolidate the law relating to the establishment, government and discipline of the armed forces of Malaysia.
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> Being a consolidating statute it sought to consolidate all existing laws pertaining to the armed forces. Thus it expressly repeals, all of the previous ordinances pertaining to the army, including the said Ordinance.

[22] That being the case, the respondents cannot purport to rely on an "old regulations which was merely applied *vide* a repealed statute" to terminate the appellant's service with TLDM. To do so would defeat the purpose of AFA as a consolidating statute.

[23] Accordingly it was learned counsel's submission that any disciplinary action against the appellant must be grounded in the provisions of the AFA and not in "an old naval regulation of a foreign country."

The Respondents' Submission

[24] The respondents rely essentially on s. 217(2) of the AFA to support their contention that the Queen's Regulations, in particular Article 0877 SNLR under which the appellant's services with TLDM was terminated, are valid and enforceable.

[25] According to learned Senior Federal Counsel (SFC) it is clear from s. 217(2) of the AFA that, *inter alia* all regulations made under or applied under the said repealed Ordinance, shall so long as they are not inconsistent with the provisions of the AFA, remain in force until specifically repealed.

[26] The Queen's Regulations was applied to the officers and ratings of or serving with the Royal Malaysian Navy (TLDM) pursuant to s. 10 of the said Ordinance.

[27] Section 10 of the said Ordinance stipulated as follows:

> All the enactment and regulations for the time being in force in the Royal Navy shall, subject to the provisions of this Ordinance and in particular to the modification set out in the schedule to this Ordinance, apply to the Officers and ratings of or serving with the Navy whether ashore or afloat or within or without the limits of the Federation.

[28] Thus although under s. 271(1) of the AFA the said Ordinance is repealed, the regulations including the Queen's Regulations made thereunder continue to remain in force so long as they are not inconsistent with the provisions of AFA.

[29] The reason why these regulations remain in force after the said Ordinance is repealed is because to date no regulations have been enacted under the AFA to provide for *inter alia*, the enlistment, discharge and dismissal of its members.

[30] In the absence of such regulations the Queen's Regulations (whose applicability is saved by s. 217(2) of the AFA) provides the authority under which TLDM exercises its power to terminate or dismiss its members.

[31] In additions to s. 217(2) of the AFA, the respondents also relied on the fact that the Armed Forces Council had, in its meeting on 31 March 1998, approved the application of the Queen's Regulations thus rendering it valid and enforceable.

Our Decision

[32] Having considered carefully the submissions of learned counsel and learned SFC and having perused the records of appeal we had, by a majority decided to allow the appeal with costs.

[33] Our reasons are as follows:

The primary, if not the sole issue before this court pertains to the validity or enforceability of the Queen's Regulations.

[34] This issue arose, as we have seen earlier from the decision of the respondents to terminate the appellant from the service of the TLDM for insubordination.

[35] The respondents' decision was made in accordance with Article 0877 of the Queen's Regulations which provides for Discharge SNLR (Service No Longer Required), Under Article 0877, Discharge SNLR can be invoked in situations, amongst others as in the present case, where discharge is considered to be in the best interests of the service due to the nature of the appellant's misconduct.

A **[36]** It is not in dispute that the Queen's Regulations were regulations which apply to the British Royal Navy and its application to the Royal Malaysian Navy (TLDM) was made possible by virtue of s. 10(1) of the said Ordinance.

[37] Section 10(1) is clear in its terms as to the application of, *inter alia*,
B the Queen's Regulations to the officers and members of TLDM. For convenience s. 10(1) is reproduced below:

> All the enactment and regulations for the time being enforce in the Royal Navy shall, subject to the provisions of this Ordinance and in particular to the modification set out in the schedule to this Ordinance, apply to the
C Officers and ratings of or serving with the Navy whether ashore or afloat or within or without the limits of the Federation.

[38] The word apply as we shall see later assumes significance when we interpret the provision s. 217(2) of the AFA.

D **[39]** The said Ordinance and with it s. 10 was repealed upon the coming into force of the AFA. The AFA came into force on 1 June 1976 and *vide* s. 217(1) the said Ordinance together with other enactments and ordinances pertaining to the armed forces were declared repealed.

[40] Notwithstanding the repeal of the said Ordinance under s. 217(1),
E subsection (2) of s. 217 provides that "… all rules, regulations, orders and other instruments made under the enactments and ordinances hereby repealed, insofar as they are not inconsistent with the provisions of this Act, shall remain in force until specifically repealed."

[41] As can be seen s. 217(2) is a savings provision which seeks to save all
F subordinate or subsidiary legislation made under the various repealed enactments and ordinances set out in s. 217(1) of the AFA. In other words s. 217(2) seeks to preserve the validity or enforceability of such subordinate or subsidiary legislation so long as they are not inconsistent with the provisions of the AFA, until they are specifically repealed.

G **[42]** The question that arises here is whether the Queen's Regulations which application to the TLDM is made possible by s. 10(1) of the said Ordinance can be said to be, by virtue thereof, regulations made under the said Ordinance and therefore continue to remain in force even though the said Ordinance has been repealed.

H **[43]** The appellants was of the firm view that s. 217(2) of the AFA does not save the Queen's Regulations as they were never made under the said Ordinance, that is they were not enacted under the said Ordinance. They were merely applied under the repealed statute. Hence with the repeal of the said Ordinance, the Queen's Regulations no longer have the force of law.

I **[44]** The respondents on the other hand was of the view that the Queen's Regulations is still law by virtue of s. 217(2).

[45] The respondents accept that the Queen's Regulations were not made under the said Ordinance. They nevertheless contended that as these regulations were applied under s. 10 of the said Ordinance, they can be said to be made under the said Ordinance and therefore is saved by s. 217(2) of AFA.

[46] The learned judge agreed with the respondents' submission and found as follows:

> First,...even though technically speaking the QRRN (Queen's Regulations) was not, enacted under the Navy Ordinance, it was applied by virtue of s.10 of the said Ordinance and was applicable to the British Royal Navy as well as the Malaysian Royal Navy.
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> In my view the fact that the QRRN was applied by virtue of the Navy Ordinance then, it is as good as it is made under the Ordinance and hence s. 217 (2) applies. In my view even though under s. 217(2) the QRRN was not made under the Navy Ordinance it was applied under the said Ordinance all the same.

[47] We are, with due respect to the learned judge, unable to agree with Her Ladyship's proposition.

[48] In our view s. 217(2), being a savings provision is very clear in its intention, which is to save all subordinate or subsidiary legislation made under the repealed enactments and ordinances set out in s. 217(1), which in our case is the said Ordinance or the Navy Ordinance 1958.

[49] The words "made under" must be given its plain and ordinary meaning and cannot be extended to include regulations applied by s. 10(1) of the said Ordinance. If it was the intention of the legislature to save such regulations they could have done so by adding the words "or applied under" after the words "made under" in s. 217(2) of the AFA.

[50] As the Queen's Regulations is punitive in nature in that it provides, *inter alia*, for the termination of service of members of the TLDM, it is imperative that the words in s. 217(2) of the AFA be given a strict construction such that only regulations made under the said Ordinance are saved and not regulations applied by the said Ordinance.

[51] It would be straining the language of s. 217(2) too much if the words "made under" is construed to mean "applied under".

[52] It must be remembered that the purpose of a savings provision such as that contained in s. 217(2) is to save all subsidiary legislation made under the principal legislation as the repeal of the principal legislation, such as the said Ordinance in our case, has the effect of repealing all subsidiary legislation made under it unless it is saved by a savings provision. (see GC Thornton *on Legislative Drafting*, 4th edn, p. 388).

[53] A similar provision is found in s. 28 of the Act 388 which reads as follows:

> 28. Where a written law repeals in whole or in part any former written law and substitutes other provisions therefor, subsidiary legislation made under the repealed law shall, in so far as it is not inconsistent with the substituted provisions, remain in force until revoked or replaced by subsidiary legislation made under the repealing law, and shall be deemed for all purposes to have been made thereunder.

[54] In the case of the said Ordinance the regulations would be those made under s. 16 of the said Ordinance. Section 16(1) confers power on the Armed Forces Council, with the approval of the Yang di-Pertuan Agong to make regulations to provide for *inter alia*, the terms and conditions of service of officers and ratings of the navy.

[55] It is significant that the said Ordinance itself makes a distinction between regulations made under the said Ordinance and regulations applied by virtue of s. 10. This can be seen in s. 11 and para. 3 of the First Schedule to the said Ordinance.

[56] Section 11 of the said Ordinance provides that the Armed Forces Council may by order amend, adapt or repeal the First Schedule to this Ordinance and any enactment or regulation applied to the Navy by s. 10. Paragraph 3 of the First Schedule stipulates that all regulations made under s. 16 shall be deemed to modify any enactment or regulation applied under s. 10 insofar as they conflict with the first mentioned regulations.

[57] It can therefore be surmised that regulations made under s. 16 and regulations applied by virtue of s. 10 of the said Ordinance are different and treated differently by the said Ordinance.

[58] In the circumstances it is our view that the repeal of the said Ordinance would mean that the regulations applied by s. 10, which includes the Queen's Regulations, would by virtue of that repeal be also repealed.

[59] It would be different, in our view, had the law, namely the said Ordinance, provide expressly that regulations applied by s. 10 shall be deemed to be made under the said Ordinance. In such a situation, the regulations would fall within the scope of s. 217(2) of the AFA and they would by virtue thereof remain enforceable.

[60] In this regard we are also unable to agree with the learned High Court Judge when she held that the Queen's Regulations remained enforceable by virtue of it being approved by the Armed Forces Council. This is what the learned judge said:

> Contrary to it being repealed in fact, the Armed Forces Council in its meeting No. 366 on 31.3.1998 had approved the application of the QRRN… and hence would remain enforceable.

[61] We agree with learned counsel for the appellant that the Armed Forces Council has no power under the AFA to approve the application or the continued usage of the Queen's Regulations.

[62] The Armed Forces Council has power (with the approval of the Yang di-Pertuan Agong) to make regulations under the AFA but only with respect to specific matters as spelt out in, for example, s. 15, s. 36, s. 155 and s. 157 of the AFA. It however does not have power to approve as stated earlier the continued application of the Queen's Regulations.

[63] As such its approval of the continued usage or application of the Queen's Regulations on 31 March 1998 has no legal effect and is purely administrative in nature.

Conclusion

[64] In conclusion we would state:

Firstly, that the learned judge erred in law when she held that "as the Queen's Regulations was applied by virtue of the Navy Ordinance then, it is as final as it is made under the said Ordinance and hence s. 217(2) applies."

[65] Section 217(2) of the AFA cannot save the Queen's Regulations as the latter is not made under the said Ordinance but are applied in this country by virtue of s. 10 of the said Ordinance.

[66] Secondly, the decision of the Armed Forces Council to approve the application of the Queen's Regulations is of no legal consequence as it does not have the power to do so under the AFA.

[67] Thirdly, we agree with the decision of the learned Judicial Commissioner in the case of *Md Redzuan Alan (supra)* when she opined with regard to the same issue before her:

> QRRN yang merupakan peraturan bagi Tentera Laut British telah dibenarkan pemakaian mengikut s. 10 Navy Ordinance 1958. Ianya bukan peraturan yang dibuat di bawah Navy Ordinance 1958. Oleh itu s. 217(2) Akta berkenaan tidak dapat menyelamatkan pemakaian QRRN daripada pemansuhan.

[68] For the above reasons therefore the appeal, by a majority, is allowed, with costs.

Abdul Aziz Abdul Rahim JCA (dissenting):

[69] The main issue in this appeal is this:

> Does an old British naval regulation – the Queen's Regulations for the Royal Navy – still have force of law in Malaysia?

[70] The appellant ("Simathari") was a non-commissioned serviceman with the Royal Malaysian Navy. Simathari was accused of a crime relating to flight warrants. He was charged in a criminal court but was discharged of

A the crime. His commanding officer, the third respondent ("Commander Rafe"), ordered him to sign a dismissal form admitting to the alleged crime. Simathari refused. Because of this refusal he was found guilty of insurbordination pursuant to the Armed Forces Act 1972 ("AFA"). He was tried summarily and punished with a sentence of suspension of leave and a
B warning.

[71] Subsequently, based on the same insubordination finding, the first respondent (the "Admiral") instructed Commander Rafe bin Hashim to initiate the process for Simathari to be terminated under the Queen's Regulations. Commander Rafe did so. There was no other regulations in
C place or in force then that was applicable to the Royal Malaysian Navy for the discharge or termination of its personnel.

[72] The Admiral then made the decision to terminate Simathari's services from the Royal Malaysian Navy, using the purported power under the Queen's Regulations.
D

[73] His service was terminated under Article 0877 of the Queen's Regulations for the Royal Navy, Revised 1967 (the "Queen's Regulations"). Simathari sought judicial review on the grounds that the Queen's Regulations was inapplicable in Malaysia. He failed. Hence, this appeal.

E **[74]** After hearing the appeal my learned sister Justice Alizatul and my learned brother Justice Varghese agreed that the appeal be allowed. However, I had a different view. On the law and the facts, it is my considered opinion that the appeal be dismissed. I now give the reasons for my decision.

[75] Before the coming into force of the AFA, each branch of the Armed
F Forces – the Army, the Navy and the Air Force – was governed by its own respective laws and regulations. The relevant law for this appeal is the Navy Ordinance 1958 ("the Navy Ordinance") which was applicable to His Majesty the Federation Naval Forces then. The Naval Ordinance was enacted by the Yang di-Pertuan Agong with the advice and consent of the
G then Legislative Council (the forerunner of our present Parliament). The purpose of the Ordinance was to provide for the establishment, discipline and regulation of a Navy in the Federation. By virtue of s. 10(1) of the Ordinance, all the enactment and regulations for the time being in force and applicable to the (British) Royal Navy were applied to the officers and ratings of or
H serving with the Malayan (later Malaysian) Royal Navy whether ashore or afloat or within or without the limits of the Federation. For ease of reference and to appreciate its full impact, s. 10 of the Ordinance is reproduced below:

> 10(1) All the enactments and regulations for the time being in force in the Royal Navy shall, subject to the provisions of this Ordinance and in
I particular to the modifications set out in the First Schedule to this Ordinance, apply to the officers and ratings of or serving with the Navy whether ashore or afloat or within or without the limits of the Federation.

(2) Any power conferred on the Admiralty by any enactment or regulation applied by sub-section (1) and relating to the remission, suspension or commutation of any sentence passed by a court martial or disciplinary court shall be exercised by the Yang di-Pertuan Agong.

[76] It also pertinent to keep in mind the provision of s. 11 of the Ordinance which empowered the Armed Forces Council to adapt, amend or repeal any enactment or regulation applied to the Navy by s. 10. Section 11 of the Ordinance reads:

11. The Armed Forces Council may by order amend, adapt or repeal the First Schedule to this Ordinance, and any enactment or regulation applied to the Navy by section 10.

[77] It is undisputed fact that the appellant was dismissed based on "Article 0877 Discharge – Service No Longer Required. Retention undesirable to the interest of Service – of The Queen's Regulation For the Royal Navy (Revised 1967) ("QRRN")". This fact was averred in the affidavit by the respondent affirmed on 18 September 2012 by one Commander Rafe bin Hashim – paragraphs 6 and 8 of the affidavit.

[78] The QRRN was made applicable to the Royal Malaysian Navy by the Armed Forces Council's decision at its 366th meeting on 31 March 1998. The Navy Ordinance 1958 was repealed by the Armed Forces Act 1972. It is to be noted that the decision to discharge the appellant from the navy was communicated to the appellant on 2 March 2012 and the discharge was to take effect on 29 March 2013. Thus at the time the decision taken to discharge the appellant and at the time the decision became effective, the applicable and relevant QRRN was already in place and in force for quite some time.

[79] The primary complaint by the appellant is that the QRRN was not **made** under the AFA (bold for emphasis). It was made applicable to the Royal Malaysian Navy by the Order of the Armed Forces Council in 1998, well after the 1958 Naval Ordinance had been repealed by the AFA which came into force in 1972.

[80] It was argued for the appellant that the QRRN was never made pursuant to or under the repealed Naval Ordinance 1958; it was merely applied under that repealed ordinance. Therefore it is not saved by the saving provision under s. 217 of the AFA. My learned sister Justice Alizatul and my learned brother Justice Varghese George accepted this argument and have read the word 'made' in s. 217(2) of the AFA literally.

[81] The repeal provision in the AFA is s. 217 and it reads as follows:

217(1)The Malay Regiment Enactment, the Federation Regiment Ordinance 1952 [Ord. 27 of 1952], the Military Forces Ordinance 1952 [Ord. 47 of 1952], the Navy Ordinance 1958, the Air Force Ordinance

1958, the Territorial Army Ordinance 1958 [Ord. 52 of 1958], the Naval Volunteer Reserve Ordinance 1958 [Ord. 55 of 1958] and the Air Force Volunteer Reserve Ordinance 1958 [Ord. 58 of 1958], are hereby required:

Provided that:

(a) all the armed forces raised under the provisions of the aforesaid enactment and ordinances shall be deemed to be raised under this Act; and

(b) all officers and servicemen serving with the armed forces raised under the provisions of the aforesaid enactment and ordinances on the appointed day shall be deemed to have been commissioned, appointed, enlisted or re-engaged, as the case may be, under this Act, but such officers and servicemen shall not be required to serve with the regular forces for a longer period than that for which they were required to serve at the time of their original commissioning, appointment, enlistment or re-engagement, as the case may be.

(2) Notwithstanding the provisions of the last foregoing subsection or the provision of any written law to the contrary, all rules, regulations, orders and other instruments made under the enactment and ordinances hereby repealed, in so far as they are not inconsistent with the provisions of this Act, shall remain in force until specifically repealed.

[82] Thus, subsection (2) to s. 217 of the AFA is the saving provision for all the rules, regulations, orders and instruments made under the repealed laws of the armed forces.

[83] The learned High Court Judge, Justice Rohana binti Yusuf (as Her Ladyship then was), accepted the fact that the QRRN was not 'made' under the repealed 1958 Naval Ordinance. However she held the view that the QRRN was applied by virtue of s. 10 of the repealed 1958 Naval Ordinance to the Royal Malaysian Navy Her Ladyship said in her decision as follows:

> [11] First, in my considered view, even though technically speaking QRRN not enacted under the Navy Ordinance, it was applied by virtue of s. 10 of the said Ordinance and was applicable to the British Royal Navy as well as the Royal Malaysian Navy. In my view the fact that QRRN was applied by virtue of the Navy Ordinance then, it is as good as it is made under the Ordinance and hence s. 217 applies. In my view even though under s. 217(2), QRRN was not made under the Navy Ordinance it was applied under the said Ordinance, all the same.

[84] However in another High Court case of *Md Redzuan Alang lwn. Panglima Tentera Laut & Satu Lagi* [2011] 1 CLJ 656, the High Court came to a different conclusion and in that case the learned Zurah Yahya JC held that "QRRN yang merupakan peraturan bagi tentera laut British telah dibenarkan pemakaian mengikut s. 10 Navy Ordinance 1958. Ianya bukan peraturan yang dibuat di bawah Navy Ordinance 1958. Oleh itu, s. 217(2) Akta berkenaan tidak dapat menyelamatkan pemakaian QRRN daripada pemansuhan.

[85] Thus, it was submitted that there are now two conflicting High Court decision on this issue and that the High Court decision in *Md Redzuan (supra)* is the correct decision.

[86] It was also submitted by the appellant that the AFA being a consolidating statute, consolidated all codifications pertaining to the armed forces and expressly repeals all previous ordinances concerning the army, including the Navy Ordinance 1958. It is therefore cannot be lawful, it was argued, for the respondents to attempt to rely on an old regulation (one from Britain, what more) which was merely applied *vide* a repealed statute. If this is the case, it was contended that the consolidating *raison d'etre* behind the Armed Forces Act 1972 is lost.

[87] It was further submitted for the appellant that the express wording of s. 217(1) of the AFA in sweeping away all previous orders, regulations etc, means that the intention of Parliament was to establish one all governing statute for a class of persons (here, the armed forces).

[88] Next, it was submitted that the High Court below erred in holding that the QRRN had force of law by virtue of it being approved by the Armed Forces Council in its 366th meeting on 31 March 1998. It was argued that the Armed Forces Council has no legislative powers. It cannot approve the use of a law from a foreign land. The Armed Forces Council, it was said, had on its own interpreted s. 217 of the AFA when it is not an authority on interpreting a statute.

[89] Furthermore, the QRRN is not found in the *Gazette*. The Interpretation Acts hold that for subsidiary legislation to have force, it must first be published in the *Gazette*.

[90] For these reasons, it was submitted that the appellant's termination pursuant to the QRRN is unlawful.

My Opinion

[91] In my view, in construing s. 217(2) of the AFA, one must apply the purposive approach and not to read the words literally. The purpose of the saving provision under s. 217 of the AFA is to save all regulations, orders, and other instruments applicable to the armed forces under the repealed enactments or ordinances in so far as they are not inconsistent with the provision of AFA. (The argument here is not that the regulations, orders and instruments (in particular the relevant QRRN) under the repealed enactments or ordinances are inconsistent with the provisions of the AFA. Rather, the argument is that the relevant QRRN was applied and not made under the repealed ordinance which is the Navy Ordinance 1958).

[92] Section 17A of the Interpretation Acts 1948 and 1967 provides that in interpreting a statute, regard must be given to the purpose of the statute. The AFA is a consolidating statute. That is to say the purpose is to

consolidate all the principal laws or statute pertaining to the armed forces under one principal Act. How does one construe consolidating act or statute? The learned authors of NS Bindra on *Interpretation of Statute,* 9th edn had this to say at p. 998:

> ... in construing the latter there is a presumption that the law was not intended to be altered so that regard may be had to decisions on the construction of the earlier enactments which are consolidated, even if the words used are not identical; but this presumption must yield to plain words to the contrary, where statutes are replaced by others which consolidate them with amendments. However, the same rules do not apply. Where earlier legislation has been profoundly altered by amending legislation before consolidation or a provision in an earlier statute is replaced by a provision in different terms in a later one, decisions on the earlier provision cannot affect the construction of the later, and the earlier statute cannot generally be resorted to for the purpose of bringing within the purview of the new statute anything omitted therefrom. Where a consolidating statute re-enacts sections that have come into existence at different previous dates, the statute must be construed on the same principles as one which enacts the provisions in question for the first time; but, if there is inconsistency in the section of a consolidating statute, it may be proper to look at the respective dates of their first enactment to explain the inconsistency. Where provisions of a consolidating Act have their origin in different legislation, the same words may bear different meanings in different provisions. Lord Alverstone CJ, in *Rex v. Abrahams* says: "the contention is, and to that extent I think it is well-founded, that in a consolidation Act, where there are ambiguous expressions, regard may be had to the previous Act if Parliament in *pari materia* for the purpose of interpreting those ambiguous expressions." According to *Craies Statute Law* following consequences ensue in relation to the interpretation of a consolidating statute:
>
> i. The courts will lean against any presumption that such an Act was intended to alter the common law.
>
> ii. Decisions on the older enactments are usually accepted as conclusive in the construction of the substituted section in the later Act, even, it would seem, although the words would, if used for the first time in the substituted section of the later Act, presumably bear another sense.
>
> iii. Statutes not expressly repealed continue in force without modification, so far as stated in the provision last set forth.

[93] However, in order to avoid any *lacuna* in the law applicable to the armed forces following such consolidation, the legislature in its wisdom has provided a saving provision whereby all subsidiary matters such as regulations, orders or instruments made under the repealed ordinances and enactments applicable to the armed forces previously are saved and

continued to be applicable. Again, referring to NS Bindra on *Interpretation of Statute,* 9th edn at p. 1421, the learned authors comment on 'saving clause' is as follows:

> Where an Act repeals a previous Act and provides that all orders issued under the repealed Act shall, so far as may be, be deemed to have been issued under the new Act, or is repealed with proviso 'except as to things done under it' the provision is designed to safeguard the validity of orders, appointments, etc, issued under the repealed Act and not to give retrospective effect to the new Act. The proviso will receive a liberal interpretation. There may be cases in which not the saving clause alone but the entire scheme of the new Act would be looked into to determine whether the protection given under the repealed Act is maintained.

[94] In this respect, the words "apply to the officers and ratings of or serving with the navy" found in s. 10 of the repealed Naval Ordinance 1958 (No. 27 of 1958) must be given a construction that is meaningful and to the effect that, in relation to the QRRN, it was made under the Naval Ordinance 1958 for that purpose. I say this because the application of the QRRN to the Malayan (now Malaysian) Naval Officers and Ratings under the repealed ordinance was by operation of law that is with the coming into force of s. 10 of the 1958 Ordinance. With the presence of s. 217(2) of the AFA, the QRRN was saved because its saving is necessary for a continuous and proper functioning and administration of the Malaysian Navy, a critical branch of the Malaysian Armed Forces. It is a fact that as at present there is no specific regulations being drafted or made under AFA to provide for the discipline and discharge of Malaysian Naval personnel. One cannot imagine how a naval force can function as efficient and well-regimented branch of the Armed Forces if there is no regulations to discipline or punish officer or ratings for misconduct. Therefore I do not agree with suggestion that the word made used in s. 217(2) be read literally.

[95] In determining whether the QRRN is applicable in this case, one must also have regard to s. 216 of the AFA. This section provides for the transitional provision which shall take effect on the date of coming into force of AFA. Subsection 2 and sub-s. 4 of s. 216 of the AFA is worth noting. And these sections reads as follows:

> (2) In relation to an offence against any section in Part I of the Malay Regiment Enactment [F.M.S. Cap. 42] or against section 11 to 14 inclusive of the Air Force Ordinance 1958 [Ord. 20 of 1958], or against sections 2 to 42 inclusive of the Naval Discipline Act 1957 [5 and 6 Eliz. 2.], of the United Kingdom as applied by section of the Navy Ordinance 1958 [Ord. 27 of 1958] (hereinafter collectively referred to as "the said sections") sections 89 to 14 inclusive and sections 149 to 155 inclusive of this Act and the rules and regulations made under sections 119, 137 and 155 shall apply as if the said sections had been contained in this Act and this Act had been in force when the offence was committed and as if any finding

A or sentence having effect before the appointed day, and anything done before that day by virtue of or in relation to such finding or sentence had been come to, awarded or done under this Act; Provided that nothing in this subsection shall render an offence capable of being tried by court-martial or dealt with summarily, if by reason of the time or place of the commission of the offence it could not have been so tried or dealt with
B under or by virtue of any of the written laws repealed by this Act.

(3) ...

(4) In section 146 references to this Act or to any provision thereof shall be construed as including respectively references to the written laws repealed by this Act or to the corresponding provisions of the Naval
C Discipline Act 1957, of the United Kingdom.

[96] It can be seen from the above transitional provisions, references were made to offences under the Naval Discipline Act of United Kingdom 1957 and for offences thereunder. Therefore in my view the saving of the QRRN
D is part and parcel of the legal regime governing the discipline of naval personnel applicable to the Malaysian Navy under the saving provision of s. 217(2) of the AFA.

[97] With regard to the argument that the QRRN was made applicable by the Armed Forces Council in its 366th meeting as evidence by the minutes
E of meeting, and which learned counsel for the appellant had argued that it is not the authority that can make laws and regulations for the armed forces, one must have regard to the provision of art. 137(1) and (2) of the Federal Constitution. These two provisions reads:

137(1)There shall be an Armed Forces Council, which shall be responsible
F under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of, and all other matters relating to, the armed forces, other than matters relating to their operational use.

(2) Clause (1) has effect subject to the provisions of any federal law, and any such law may provide for the vesting in the Armed Forces Council of any functions with respect to the armed forces.
G

[98] It can be seen that the Armed Forces Council was established under the provision of the Federal Constitution and is charged with the command, discipline and administration of, and all other matters relating to the armed forces, other than matters relating to their operational use. In this regard,
H reference to s. 155 of the AFA is helpful. This section empowers the Armed Forces Council to make regulation in respect of matters for which regulations and Perintah Majlis Angkatan Tentera may be made. Section 155 reads:

155. Subject to section 136 the Armed Forces Council with the approval of the Yang di-Pertuan Agong may make regulations in respect of
I matters for which regulations and Perintah Majlis angkatan Tentera may be made under the foregoing provisions of this Part.

It is to be noted that the expression "this Part" in s. 155 of the AFA cited above is a reference to Part V of AFA which deals with service, offences and punishment including mutiny and insubordination. In other words, Part V of AFA deals with the disciplinary aspect of the armed forces.

[99] For the above reasons, I do not agree that the Armed Forces Council does not have the authority to make or direct the application of QRRN to the Malaysian Navy. Even though QRRN was not literally made under the repealed Naval Ordinance 1958, its application to the Malaysian Naval personnel is valid and lawful by virtue of the order of the Armed Forces Council made in its 366th meeting. Furthermore, as I have said above, the QRRN which was made under the United Kingdom or the British Naval Discipline Act 1957 was made applicable by way of operation of law under s. 10 of the repealed Navy Ordinance 1958.

[100] Accordingly, I will dismiss the appeal. Lastly, learned counsel for the appellant in his memorandum of appeal had also raised several other issues; however in the course of his oral submissions before this court he had indicated that he is not pursuing the other issues in his memorandum of appeal. Therefore, I take it that he had decided to abandon them.